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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 603

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

STATE OF IOWA, INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 54–72) is reported in 151 F. 2d 20. The opinion and order of the Federal Power Commission (R. 11–17) are reported in 52 P. U. R. (NS) 82.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1945 (R. 72–73). The petition for writ of certiorari was filed November 13,

1945. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*), and Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether the court below properly declined to pass upon the constitutional validity of Chapter 363 of the Iowa Code of 1939 in the absence of a decision on that question by the courts of Iowa.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) and of the Iowa Code (Chapter 363, Iowa Code, 1939, Secs. 7767–7796.1) are set forth in the Appendix, *infra*, pp. 12–23.

STATEMENT

Upon a declaration of intention to construct a hydro-electric power development on the Cedar River in the State of Iowa, filed by petitioner under Section 23 (b) of the Federal Power Act, the Commission found, after investigation, that the Cedar River and the Iowa River into which it flows are navigable waters of the United States (R. 14, fn.) and that the proposed project would affect the navigable capacity of the Mississippi River and the interests of interstate commerce

(*First Iowa Hydro-Electric Cooperative*, 2 F. P. C. 958, 959, 960). Thereafter, on August 11, 1941, petitioner filed an application for license under Section 4 (e) of the Act (R. 1–10), on which extensive hearings were held (R. 20).

The project for which license ultimately was sought was a modification of the development originally proposed. It consisted of a dam across the Cedar River, some 21 miles above its confluence with the Iowa River, and about 50 miles above the confluence of the latter with the Mississippi River; a diversion canal to carry the water about 8 miles from the reservoir created by the dam on the Cedar River to a power plant near the Mississippi River into which the water would be discharged about 25 miles above the confluence of the Mississippi and Iowa Rivers (R. 14, 40–42; for map, see Ex. 38, not printed). The modified project included changes suggested by the Chief of Engineers of the War Department (R. 15).

At the hearings on the application, the State of Iowa intervened and objected to the issuance of the license on the ground, *inter alia*, that petitioner had not met the requirements of Section 9 (b) of the Act[1] in that it had failed to submit

[1] "Sec. 9. That each applicant for a license hereunder shall submit to the commission— * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion,

"evidence of compliance" with Chapter 363 of the Iowa Code prohibiting construction of a dam "in any navigable or meandered stream for any purpose, or in any other stream for * * * power purposes," unless a permit has been granted by the State Executive Council (Sec. 7767; Appendix, *infra*, p. 20). The State statute provides that such a permit shall be issued only if it appears to the Executive Council that, among other things, the dam "will not materially obstruct existing navigation * * * and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity" (Sec. 7771, Appendix, *infra*, p. 21).

The petitioner admitted that it had not applied for a permit from the Executive Council for the modified project, but contended that it was not required to obtain such a permit in order to satisfy the requirements of Section 9 (b). It argued that no permit could be issued under Section 7771 of the Iowa statute since an integral part of the proposed project was the diversion of water from the Cedar River through a canal to

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and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

the Mississippi River,[2] and that the Iowa statute, insofar as applicable, was therefore invalid as an undue interference with the authority of the Federal Government over the navigable waters of the United States (R. 17).

The Commission, by its opinion and order of January 29, 194[illegible] found that petitioner had not "presented satisfactory evidence, pursuant to Section 9 (b) of the Federal Power Act, of compliance with the requirements of applicable laws of the State of Iowa requiring a permit from the State Executive Council to effect the purposes of a license under the Federal Power Act" (R. 18). Therefore, although finding that the proposed project called for "a practical and reasonably adequate development" (R. 15), the Commission dismissed the application for license "without prejudice to renewal within one year upon satisfying the requirements of Section 9 (b) of the Federal Power Act" (R. 18-19). While the Commission was of the opinion that it was "bound by the requirements" of Section 9 (b) of the Act, it stated that "the appropriate place for a determination of the validity of such State

[2] The Executive Council twice refused to issue the petitioner a permit for the construction of the originally proposed single river development, which did not involve the diversion of water from the Cedar River to the Mississippi River (Tr. 30, 2999).

laws is in the courts and if we dismiss the application * * * applicant may seek review of our action and its contentions under Section 313 (b) of the Federal Power Act" (R. 17). Application for rehearing by the Commission was denied on March 7, 1944.

Pursuant to Section 313 (b) of the Act, petitioner then sought to set aside the Commission's order by petition for review in the court below (R. 38–47).

The State of Iowa, by its Attorney General, acting pursuant to a special resolution of the State Executive Council, intervened in support of the Commission's order (R. 48–52). It took the position in its motion to intervene (R. 49), that the Executive Council could not lawfully grant a permit for the proposed dam, and argued that there was no conflict because the Federal Act was a merely permissive statute and Congress intended to give the States the power to veto hydro-electric power developments under the Act.

The Commission took the position that it had properly declined to assume the judicial prerogative of holding the Iowa statute invalid in the absence of a controlling judicial precedent, but that on judicial review, that question should be considered and passed upon by the court (R. 59, fn. 15). The Commission then argued that the Iowa statute, as construed by the State Attorney General to prohibit construction of the proposed

project, was invalid because so conflicting with the Federal Power Act as to be superseded by its provisions and not "saved" by Section 9 (b).

The court below affirmed the Commission's order (R. 72–73), but declined to pass upon the validity of the Iowa statute (R. 58). Observing that the question presented "is a difficult one," the lower court held that petitioner should have applied for the State permit and pursued such remedies as may be available in the State to establish its right to issuance of a permit, before applying for a Federal license; that it was the court's duty "to avoid the issue of constitutionality if the statute * * * is susceptible of any reasonable interpretation consistent with constitutionality"; and that in the absence of an Iowa court decision, there were possible interpretations of the Iowa statute under which a State permit could be granted for the project (R. 58–59). It therefore concluded that there had been no showing that the Iowa law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and, hence, that "the Commission, properly, insisted upon a good faith effort, by its applicant, to comply with the State law" (R. 71–72). In so doing the lower court was, nevertheless, careful to make clear that Congress had not, by Section 9 (b), required State consent to such projects or given the States a veto power over them (R. 66).

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DISCUSSION

The requirement in Section 9 (b) of the Federal Power Act that an applicant for license submit "satisfactory evidence" that it has complied with the State laws therein specified is limited to constitutionally valid State laws. *Poindexter* v. *Greenhow*, 114 U. S. 270, 301–306; cf. *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 215–216; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347; *Norton* v. *Shelby County*, 118 U. S. 425, 442.

The Commission, as an administrative agency, properly declined to hold the State statute invalid in the absence of a controlling judicial decision of that question. Cf. *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 153. In that case the court held that "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the" administrative agency. Nor could the Commission, which had already found the Cedar River to be a navigable stream, decline to treat the Iowa statute, which by its terms applied to the construction of dams for power purposes in navigable streams (Sec. 7767, Appendix, *infra*, p. 20), as inapplicable to the proposed project, in the absence of a court decision.

But the lower court in this case was asked by the petitioner, as a "party aggrieved" by the

Commission's order, to set the order aside (and by the intervenor to affirm it) in the exercise of that court's exclusive jurisdiction under Section 313 (b) of the Act to "affirm, modify, or set aside the order." The function of that court in this regard was broader than that of the Commission. An illustrative analogy is found in a comparison of the scope of administrative decision, when objections to the constitutionality of a statute are made in a proceeding before the agency administering such a statute, with the scope of decision on judicial review of the agency's order. Thus, in a proceeding under the Natural Gas Act of 1938, c. 556, 52 Stat. 821, 15 U. S. C. 717, although the Commission properly refused to consider a party's contention that the Act, as applied to it, was unconstitutional (*In the Matter of Mississippi River Fuel Corporation*, 2 F. P. C. 170, 175, 34 P. U. R. (NS) 8), the circuit court of appeals, in reviewing that order,[3] fully considered and passed on that contention. *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 121 F. 2d 159 (C. C. A. 8); see also *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, affirming 2 F. P. C. 218.

Similarly, the Commission's assumption of the validity of Chapter 363 of the Iowa Code, in determining that petitioner had not complied with

[3] Under Section 19 (b) of the Natural Gas Act, which is identical with Section 313 (b) of the Federal Power Act.

Section 9 (b) of the Federal Power Act in this proceeding, did not withhold from the court below jurisdiction to consider and determine the constitutional validity of that statute in a proceeding to review the Commission's order. In the words of the Court in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 133–134, on review petitioner "can come into court * * * because he urges errors of law outside the Commission's final say-so."

But although the lower court had jurisdiction to decide the question of the constitutional validity of the Iowa statute as applied to the proposed project (*United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 216–218; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347), it declined to do so on grounds of comity, observing that there were possible interpretations of the Iowa statute under which a State permit might be granted for the project, and that it should avoid the constitutional question in the absence of an Iowa court decision.

Notwithstanding the position taken by the State negativing any such interpretation, when it intervened in the court below, we recognize the possibility that the courts of the State may take a different view, particularly in the light of the opinion below. In view of that possibility it cannot well be argued here that the lower court was guilty of an abuse of discretion in avoiding the constitutional question. Cf. *Asbury Hospital* v. *Cass*

County, No. 35, this Term, decided November 5, 1945, slipsheet opinion, pp. 4–5; *Alabama State Federation of Labor* v. *McAdory*, No. 588, 1944 Term (decided June 11, 1945); *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293; *Watson* v. *Buck*, 313 U. S. 387, 401–402; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 171–172; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 501. Accordingly we feel precluded from asking that the decision below be reviewed by this Court.

CONCLUSION

For the reason stated we do not join in the request for issuance of a writ of certiorari.

J. HOWARD MCGRATH,
Solicitor General.

HOWARD E. WAHRENBROCK,
Assistant General Counsel,

LOUIS W. MCKERNAN,
Principal Attorney,
Federal Power Commission.

DECEMBER 1945.

APPENDIX

Federal Power Act, as amended:

SEC. 4. * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the

adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

SEC. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by

States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

* * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require.

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * * *

SEC. 11. That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, in so far as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights of way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States.

SEC. 12. That whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in

the cost of construction of such navigation structures.

* * * * * *

SEC. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

* * * * * *

SEC. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation,

State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works

across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

* * * * *

SEC. 29. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided,* That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, grant-

ing certain rights of way to the city and county of San Francisco, in the State of California: *Provided further,* That section 18 of an Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed.

* * * * * *

Code of Iowa, Chapter 363, Mill Dams and Races:

7767 PROHIBITION—PERMIT. No dam shall be constructed, maintained, or operated in this state in any navigable or meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation or municipality constructing, maintaining, or operating the same. (R60, § 1264; C73, § 1188; C97, § 1921; C24, 27, 31, 35, § 7767)

7768 APPLICATION FOR PERMIT. Any person, firm, corporation or municipality making application for a permit to construct, maintain, or operate a dam in any of the waters, including canals, raceways, and other constructions necessary or useful in connection with the development and utilization of the water or water power, shall file with the executive council a written application, which shall contain the following information:

1. The name of the navigable, meandered, or other stream in or across which a dam is maintained or it is proposed to construct a dam or other obstruction, and a

description of the site for such dam, including the name or names of the riparian owners of the site.

2. The purpose for which the dam is maintained or for which it is proposed to maintain the same, including the use to which the water is to be put.

3. A general description of the dam, raceways, canals, and other constructions, including the specifications as to the material and plan of construction and a general description of all booms, piers, and other protection works which are constructed in connection therewith, or which it is proposed to erect in connection therewith.

4. The approximate amount of hydraulic power that the dam is capable of developing and the amount of power to be used.

5. A map or blue print on a scale of not less than four inches to the mile, showing the lands that are or may be affected by the construction, operation, or maintenance of the dam, and the ownership of each tract of land within the affected area.

6. Such additional information as may be required by the executive council. (R60, § 1265; C73, §§ 1188, 1189; C97, § 1921; C24, 27, 31, 35, § 7768.)

* * * * *

7771 WHEN PERMIT GRANTED. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navigation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished

in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, § 1269; C73, §§ 1193, 1198; C97, § 1930; C 24, 27, 31, 35, § 7771).

7772 CERTIFICATE OF APPROVAL. No permit shall be granted for the construction or operation of a dam where the water is to be used for manufacturing purposes, except to develop power, until a certificate of the state department of health has been filed with the council showing its approval of the use of the water for the purposes specified in the application. (C24, 27, 31, 35, § 7772.)

* * * * *

7776 CONSTRUCTION AND OPERATION. The executive council shall investigate methods of construction, reconstruction, operation, maintenance, and equipment of dams, so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the state and so as to protect the life, health, and property of the general public; and the method of construction, operation, maintenance, and equipment of any and all dams in such waters shall be subject to the approval of the executive council. (C24, 27, 31, 35, § 7776.)

* * * * *

7778 DUTY TO ENFORCE STATUTES. It shall be the duty of the council to require that all existing statutes of the state, including the provisions of this chapter, with reference to the construction of dams, shall be enforced. (C24, 27, 31, 35, § 7778.)

* * * * *

7796 STATE LANDS. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, § 7796.)

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